Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996	)	
	)	
Telecommunications Carriers' Use	)	
Of Customer Proprietary Network	)	
Information and Other Customer Information;	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Section 271 and 272 of the	)	
Communications Act of 1934, As Amended	)	

CTSI, LLC REPLY COMMENTS

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TABLE OF CONTENTS

SUMMARY

The vast majority of commenters in this proceeding support the adoption of an opt-out approach for carrier use of customer proprietary network information ("CPNI") under Section 222(c)(1) and urge the Commission to reject any mandatory opt-in regime.[1] CTSI agrees that the Commission should permit carriers to obtain customer approval for cross-marketing purposes through an opt-out arrangement. Moreover, the Commission should not resurrect its mandatory opt-in requirements. As a number of commenters made clear, the Commission bears an insurmountable legal burden to demonstrate that any mandatory "opt-in' arrangement will withstand First Amendment scrutiny as set forth by the Tenth Circuit in *U S WEST v. FCC*.[2] Conversely, a permissible opt-out approach will withstand First Amendment scrutiny as a reasonable, narrowly tailored means by which the privacy and competitive interests underlying Section 222 may be achieved. An opt-out approach is also the accurate statutory interpretation of what constitutes customer "approval" under Section 222(c)(1).

While CTSI urges the Commission to allow carriers to use opt-out mechanisms to obtain customer approval for carrier use of CPNI under Section 222(c)(1), CTSI does not object to allowing carriers to also use opt-in mechanisms if they so desire. CTSI, however, specifically objects to Qwest's proposal to impose burdensome reporting obligations on carriers by requiring them to notify the Commission of what approval

1 *See, e.g.,* AT&T Wireless Services, Inc. ("AT&T Wireless") Comments pp. 1-9; Direct Marketing Association ("DMA") Comments at pp. 3-6; Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") Comments at pp. 3-8; VarTec Telecom, Inc. ("VarTec Telecom") Comments at pp. 2-3; Verizon Wireless Comments at pp. 4-15. Even those who do not advocate a mandatory opt-out arrangement nevertheless agree that the Commission should allow carriers to obtain customer approval under 222(c)(1) by means of an opt-out mechanism.

2 *U.S. West, Inc. v. Fed. Communications Comm'n*, 182 F.3d 1224 (10th Cir. 1999) [hereinafter *U S WEST v. FCC*].

mechanism they intend to use – opt-out or opt-in – and provide copies of any notifications utilized in the approval process.[3]

3 *See* Qwest Services Corporation ("Qwest") Comments at p. 5.

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CTSI, LLC REPLY COMMENTS

CTSI, LLC ("CTSI") pursuant to the Federal Communications Commission's ("Commission") Second Further Notice of Proposed Rulemaking released in the above-captioned proceedings on September 7, 2001,[4] respectfully submits its reply comments in support of allowing carriers to use an opt-out approach to obtain customer consent for carrier use of Customer Proprietary Network Information ("CPNI") under Section 222(c)(1) of the Communications Act of 1934, as amended (the "Act").[5]

CTSI is a competitive local exchange carrier currently operating primarily in central and north central Pennsylvania. CTSI provides competitive local exchange services to both residential and business customers in its operating territory and provides

[4] Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, CC Docket Nos. 96-115 and 96-149, *Clarification Order and Second Further Notice of Proposed Rulemaking*, FCC 01-247 (rel. Sept. 7, 2001) [hereinafter *Second CPNI FNRM*].

exchange access services to interexchange carriers ("IXCs") that provide long distance services to its local exchange service customers. Like most, if not all, competitive carriers, CTSI relies on marketing to expand its customer base and to introduce new services to customers. CTSI will be affected directly by any rules promulgated by the Commission pursuant to Section 222(c)(1) of the Act. For the reasons discussed herein, CTSI urges the Commission to permit carriers to use an opt-out approach in order to gain customer consent to use CPNI for marketing purposes.

I. THE COMMISSION SHOULD NOT RESURRECT A MANDATORY OPT-IN APPROACH FOR CUSTOMER APPROVAL UNDER SECTION 222(C)(1).

CTSI supports the position shared by an overwhelming majority of parties in this proceeding that the Commission should not resurrect any mandatory opt-in requirement for obtaining customer approval for carrier use of CPNI under Section 222(c)(1) of the Act.[6] As numerous commenters have explained, the Tenth Circuit's decision in *U S WEST v. FCC* has effectively made the adoption of any mandatory opt-in approach a formidable proposition in which the Commission bears a heavy legal burden to demonstrate that such approach is legal under the First Amendment.[7]

In order to adopt a mandatory opt-in approach, the Commission must show that the approach satisfies all three prongs of the *Central Hudson* test for restrictions on commercial speech.[8] The Commission must demonstrate that (1) the Commission has a

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5 47 U.S.C. § 222(c)(1).

6 *See, e.g.*, CenturyTel, Inc. ("CenturyTel") Comments at pp. 8-12; OPASTCO Comments at pp. 3-7; United States Telecom Association ("USTA") Comments at pp. 5-9; VarTec Telecom Comments at pp. 2-3; Verizon Wireless Comments at pp. 12-15.

7 *See* DMA Comments at p. 3; Qwest Comments at p.7; Verizon Wireless Comments at pp. 12-15.

8 *See U S WEST V. FCC*, 182 F.3d 1224, 1233-40 (10th Cir. 1999) (*citing Central Hudson Gas & Electric Corp. v. Pub. Service Comm'n of New York*, 477 U.S. 557 (1980)).

"substantial state interest" in adopting customer approval requirements for carrier use of CPNI under Section 222(c)(1); (2) a mandatory opt-in approach "directly and materially" advances that interest; and (3) a mandatory opt-in approach is "narrowly tailored" to suppress no more speech than necessary to further that interest.[9]

As a number of commenters have pointed out, even if the Commission were to prove that a mandatory opt-in approach materially advances a substantial government interest in privacy and/or competition, it would be next to impossible for the Commission to demonstrate that a mandatory opt-in approach is a narrowly-tailored means by which to advance that interest when a less restrictive opt-out approach is available.[10] Even the few commenters that advocate a mandatory opt-in approach failed to address or explain how an opt-in approach is narrowly tailored and, instead, emphasized the first two prongs of the *Central Hudson* test only. [11]

Since a mandatory opt-in approach is unlikely to withstand First Amendment review by an appellate court as a lawful restriction on commercial speech, CTSI urges the Commission to reject any notion to resurrect its former mandatory opt-in regime.

II. AN OPT-OUT MECHANISM IS CONSISTENT WITH THE FIRST AMENDMENT, ENSURES CUSTOMER PRIVACY, AND PROMOTES COMPETITION UNDER SECTION 222(C)(1).

CTSI supports the position of most commenters that the Commission should allow carriers to obtain customer approval for carrier use of CPNI through an opt-out

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9 *See id.*

10 *See* Direct Marketing Association Comments at p. 3; Verizon Wireless at pp. 13-15; Sprint Corporation Comments pp. 8-9.

11 *See* Electronic Privacy Information Center, et al. Comments at pp. 1-7; National Association of Regulatory Utility Commissioners at pp. 1-2.

methodology.[12] Not only is a permissible opt-out approach consistent with the First Amendment protections on commercial speech, it also is a reasonable statutory interpretation of the approval required under Section 222(c)(1) of the Act.

A. A Permissible Opt-Out Consent Approach is Consistent with the First Amendment Protections on Commercial Speech.

CTSI agrees with AT&T Wireless Services, Inc. ("AT&T Wireless") that an opt-out approach that allows carriers to obtain consumer consent for carrier use of CPNI through opt-out mechanisms is consistent with the First Amendment protections on commercial speech.[13] CTSI, however, disagrees with AT&T Wireless and other commenters who believe that privacy is the only interest underlying the approval requirements of Section 222(c)(1).[14] CTSI instead supports the position of a number of commenters that in addition to privacy protections, competitive concerns also should be considered by the Commission in formulating what constitutes permissible approval obtained for carrier use of CPNI under Section 222(c)(1).[15]

CTSI believes that a permissible opt-out approach is likely to withstand First Amendment scrutiny as a reasonable, narrowly tailored means by which the privacy and competitive interests underlying Section 222 may be achieved. As demonstrated below, a

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12 *See, e.g.,* AT&T Wireless Services, Inc. ("AT&T Wireless") Comments pp. 1-9; Direct Marketing Association ("DMA") Comments at pp. 3-6; Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") Comments at pp. 3-8; VarTec Telecom, Inc. ("VarTec Telecom") Comments at pp. 2-3; Verizon Wireless Comments at pp. 4-12.

13 *See* AT&T Wireless Corp. at pp. 6-9. While many commenters did not specifically explain that an "opt-out' approach is likely to withstand First Amendment scrutiny, it can be reasonably inferred that most opt-in supporters believe that a such an approach does run afoul of the First Amendment.

14 *See id.* at p. 7; *see also* SBC Communications, Inc. ("SBC") Comments at p. 9. While SBC is the only other commenter who explicitly indicated that competitive interests should not be considered in formulating rules under Section 222(c)(1), several other commenters only explained the privacy issues with which the Commission should consider, ignoring the competitive issues. *See, e.g.,* ALLTEL Communications, Inc. ("ALLTEL") Comments at pp. 4-6, Verizon telephone companies ("Verizon") Comments at pp. 2-4; USTA Comments at p. 11.

permissible opt-out approach satisfies all three prongs of the *Central Hudson* test: (1) the Commission has a substantial interest in protecting the privacy of CPNI and in promoting competition; (2) a permissible opt-out approach "directly and materially" advances that interest; and (3) a permissible opt-out approach is "narrowly tailored" to suppress no more speech than necessary to further that interest.

1. The Commission Has a Substantial Interest in Protecting the Privacy of CPNI and Promoting Competition.

A majority of the commenters in support of opt-out arrangements agree that the Commission needs to consider both privacy and competition goals underlying Section 222 in formulating a rule that best satisfies the "approval" requirement under Section 222(c)(1).[16]

CTSI believes that by the plain text of the statute, the Commission is restricted from ignoring the privacy protections afforded to CPNI in formulating rules for an approval mechanism under Section 222(c)(1). The text of Section 222 makes it clear that privacy of CPNI is one of the primary purposes underlying the enactment of this provision. Section 222 itself is entitled "Privacy of Customer Information" and, as Mpower Communications Corp. pointed out in its comments, the very first subsection of Section 222 lays out the importance of protecting the privacy of this information by placing upon "every telecommunications carrier" an affirmative duty to protect the

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15 *See, e.g.,* Mpower Communications Corp. ("Mpower") Comments at pp. 7-8; WorldCom Inc. (WorldCom") Comments at pp. 4-5; VarTec Telecom Comments at p. 3.

16 *See* AT&T Corp. Comments at pp. 5-10; BellSouth Corporation ("BellSouth") Comments at pp. 4-5; CenturyTel Comments at pp. 4-8; Verizon Wireless Comments at pp. 4-6; WorldCom Comments at pp. 4-5.

privacy of proprietary information of customers.[17] Furthermore, Section 222(c) itself is entitled "Confidentiality of Customer Proprietary Network Information", again plainly demonstrating the government's concern for privacy of CPNI.[18]

With respect to the pro-competitive interests, CTSI agrees with the majority of opt-out supporters that the Commission must also consider competitive interests in formulating an approval requirement under Section 222(c)(1).[19] CTSI concurs with WorldCom and Mpower that the entire purpose of the Telecommunications Act of 1996 ("1996 Telecom Act"), of which Section 222 is a part, is to promote competition and that even if Section 222 may not specifically address competition, it would be illogical for Congress to have intended Section 222 to undermine the pro-competitive purposes underlying the 1996 Telecom Act.[20]

2. A Permissible Opt-Out Approach Directly and Materially Advances the Commission's Interests in Protecting the Privacy of CPNI and Promoting Competition.

CTSI believes an opt-out approach would advance the Commission's privacy interest by ensuring consumers are informed and given an opportunity to act, while also promoting competition by giving carriers a reasonable, cost-effective means by which to obtain customer approval for marketing of their products. CTSI concurs with commenters that in its experience, most customers desire and expect carriers to use CPNI

17 *See* 47 U.S.C. §§ 222, 222(a); *see also* Mpower Communications Corp. Comments at p. 2.
18 *See* 47 U.S.C. § 222(c).
19 *See* AT&T Corp. Comments at p. 8; BellSouth Corporation ("BellSouth") Comments at p. 7; CenturyTel Comments at pp. 7-8; Verizon Wireless Comments at pp. 4-6; WorldCom Comments at pp. 4-5.
20 *See* WorldCom Comments at p. 4-5; Mpower Comments at p. 7 (citing to the minority opinion in *U S WEST v. FCC*, 182 F.3d at 1245).

to market products and services to them.[21] Customers, as well as the market, benefit from the free flow of information. Accordingly, so long as those few customers who do not wish for CPNI to be used in this manner are given the means by which they can opt-out and protect their privacy interests in CPNI, an opt-out approach would appropriately fulfil the Commission's privacy interests in CPNI under Section 222(c)(1).

Additionally, an opt-out approach would provide a cost-effective means by which carriers could satisfy the desires of most customers, which in turn would fulfil the competitive interests in the Commission in implementing Section 222(c)(1). As several commenters noted, an opt-out approach is a more cost-effective means to obtain customer approval.[22] For example, carriers may send a bill insert to their customer explaining their opt-out rights, which would not be cumbersome, even to smaller carriers. Accordingly, an opt-out approach would not place smaller carriers at a competitive disadvantage to larger carriers, at least no more than currently exists in the market.

Furthermore, CTSI agrees with the position of many commenters that it is likely that many customers who would otherwise want the carrier to use CPNI to market other services to the customer, may not take the time to fill out an affirmative opt-in consent.[23] However, these same customers could have access to this desired communication by their carriers under an opt-out approach and could at any time exercise that right.

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21 *See* CenturyTel Comments at p. 7; OPASTCO Comments at p. 8; Verizon Comments at pp. 4-6.

22 *See* AT&T Corp. Comments at p. 10 (citing to several Commission order in which the Commission also noted the cost-effectiveness of opt-out mechanisms, including *Computer II Remand Order*, 6 FCC Rcd. 7571, ¶ 85, n. 155 (1991) (other citations omitted); *see also* CenturyTel Comments at p. 11; VarTec Comments at p. 2.

23 *See* CenturyTel Comments at pp. 9-10; OPASTCO Comments at p. 6; VarTec Telecom Comments at p. 3.

Moreover, CTSI disagrees with the opponents of the opt-out approach that such an approach is unlawful because there is no guarantee that the customer has actual "knowledge" of their rights.[24] While it may be true that some customers may throw away an opt-out notice received in the mail,[25] the logical conclusion to their argument is that a no notice procedure could confer "knowledge" of the contents. That argument seems unreasonable in that notices are used in a great number of other instances to confer "knowledge" on behalf of parties, including in federal and state service of process laws and to opt-out of class-action lawsuits. Additionally, as numerous commenters have noted, the Commission itself uses opt-out procedures in a variety of other contexts, including for the disclosure of private cable subscriber information[26] and in the transfer of subscriber bases of telecommunications carriers.[27] Opt-out notices are also used to obtain approval for disclosure of private information used in other industries, including the financial and health care industries.[28]

Accordingly, it is clear that an opt-out procedure would not fail constitutional muster because actual knowledge from an opt-out notice could not be guaranteed. Rather, the adoption of an opt-out approach would enable the Commission to protect the privacy interests of CPNI, while also fulfilling the Commission's interest in promoting competition. In sum, both the Commission's privacy and competitive interests in Section 222(c)(1) could not only be advanced, but also achieved through a permissible opt-out approach, in satisfaction of the second prong of the *Central Hudson* test.

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24 *See* Electronic Privacy Information Center, et al. Comments at p. 6.
25 *See id.* at p. 5-6.
26 *See* DMA Comments at p. 3; BellSouth Comments at pp. 67.
27 *See* SBC Comments at p. 11.

3. A Permissible Opt-Out Approach is "Narrowly-Tailored" to Suppress No More Speech Than Necessary to Further the Commission's Interests in Protecting the Privacy of CPNI and Promoting Competition.

It is clear that allowing carriers to obtain consent through an opt-out approach not only fulfills the Commission's interest in protecting the privacy of CPNI and promoting competition, but is a narrowly-tailored means by which to achieve these goals. As cited by the Tenth Circuit, "[n]arrow tailoring means that the government's speech restriction must signify a 'carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition."[29] The opt-out restriction is less costly than drafting individual contracts for customer execution and carrier processing. Moreover, the customer is benefited as the notice provides an opportunity for the customer to understand the existence of CPNI and the customer's right to refuse consent. The opt-out method strikes a reasonable balance between protecting free commercial speech and protecting customer privacy.

The vast majority of commenters agree that permitting carriers to use an opt-out methodology to obtain customer approval is not nearly as intrusive as the burdensome alternative of a mandatory opt-in regime.[30]

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28 *See* ALLTEL Communications, Inc. at p. 5; AT&T Wireless at p. 4; Nextel Communuications, Inc. at p. 6; OPASTCO at p. 4.

29 *U S WEST v. FCC*, 182 F.3d at 1238 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)).

30 See AT&T Wireless Comments at pp. 3-4; CenturyTel Comments at p. 9; National Telephone Cooperative Association Comments at pp. 2-3; OPASTCO Comments at pp. 5-7; BellSouth Comments at p. 5.

B. A Permissible Opt-Out Mechanism Is A Reasonable Statutory Interpretation of Customer "Approval."

CTSI agrees with Verizon Wireless and AT&T Corp. ("AT&T") that the text of Section 222 of the Act itself provides clear evidence that Congress did not intend for customer "approval" under Section 222(c)(1) to mandate an opt-in methodology.[31] Specifically, Section 222(c)(1) requires merely "*approval of the customer*" for a carrier to internally use CPNI for marketing purposes.[32] In contrast, Congress amended Section 222 in 1999 to add a new Section 222(f) that requires "*express prior authorization*" before a carrier can use or disclose certain wireless location information.[33]

CTSI concurs with AT&T that Congress was clearly aware of Section 222(c)(1) and its mere "approval" requirement for carrier use of CPNI when it established Section 222(f) as Section 222(f) explicitly refers to Section 222(c)(1).[34] In fact, it appears likely that the purpose of Section 222(f) was to add more rigorous "express" approval requirement to the wireless location information at issue than is mandated under the broad "approval" requirement for carrier use of CPNI under Section 222(c)(1). Otherwise, a new section and an entirely new, specific description of the "express" approval requirement for disclosure or use of that wireless location information would not have been necessary.[35]

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31 *See* Verizon Wireless Comments at pp.11-12; AT&T Corp. Comments at pp. 2-3.

32 *See* 47 U.S.C. § 222(c)(1).

33 Wireless Communications and Public Safety Act of 1999 (911 Act), Pub. L. No. 106-81, enacted Oct. 26, 1999, 113 Stat. 1286, amending the Communications Act of 1934, 47 U.S.C. §§ 222, 225.

34 *See* AT&T Corp. Comments at pp. 2-3. Section 222(f) states, "For purposes of subsection (c)(1), with the express prior authorization of a customer, a customer shall not be considered to have approved the use or disclosure of access to [certain] call location." 47 U.S.C. § 222(f).

35 In fact, at the same time Section 222(f) was created, Congress also amended Section 222(d), which provides a list of exceptions for which customer approval is not needed prior to disclosing CPNI. Section 222(d) was amended to allow the disclosure of certain call location information in emergency situations without first obtaining customer approval. Therefore it is reasonable to conclude that if Congress had

Moreover, under basic principles of statutory interpretation, the absence of the term "express" to describe the customer approval necessary for carrier use of CPNI, when "express" is used in the same section to describe the customer approval necessary for use of wireless location information, clearly demonstrates Congress' intent not to impose an "express" requirement on carrier use of CPNI. As such, CTSI supports the proposition that the adoption of a mandatory opt-in approach for carrier use of CPNI, which by its nature constitutes obtaining express approval from customers, is not a least restrictive interpretation of the customer "approval" requirement needed to satisfy Section 222(c)(1).[36] Allowing carriers to use an opt-out methodology, a mechanism that does not require express consent on behalf of the customer, is a reasonable interpretation of the customer "approval" needed to satisfy Section 222(c)(1).[37]

III. THE COMMISSION SHOULD NOT ADOPT THE ONEROUS REPORTING REQUIREMENTS PROPOSED BY QWEST.

CTSI does not object to allowing carriers to use opt-in mechanisms if they so desire, so long as carriers are also allowed to use opt-out mechanisms as well. However, CTSI specifically objects to Qwest's proposal to impose new reporting obligations on carries by requiring them to notify the Commission of what approval mechanism they intend to use – opt-out or opt-in – and provide copies of any notifications utilized in the approval process.[38]

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intended the approval requirement under Section 222(f) to constitute the same approval requirement contained in Section 222(c)(1), it would have amended Section 222(c)(1) to cover the call location information currently located in Section 222(f). Instead, Congress created a new section and provided a different "express" approval requirement, again demonstrating that the "express" approval requirement under Section 222(f) for certain call location information is meant to be more rigorous approval requirement than the broad "approval" mandate found in Section 222(c)(1) for carrier use of CPNI.

36 *See* Verizon Wireless Comments at p. 12; AT&T Corp. Comments at p. 3.

37 *See* Verizon Wireless Comments at p. 12; AT&T Corp. Comments at p. 3.

38 *See* Qwest Comments at p. 5.

Not only are these requirements burdensome, but they also do not appear to achieve any specific goal other than bog down the Commission with unnecessary paperwork and unnecessarily expend the resources of carriers that could be used for more effective purposes. Should any problems or issues arise with respect to whether customer approval was in fact obtained through lawful means, this information regarding the approval process of particular carrier could be provided to the Commission at that time. Accordingly, the Commission should reject any notion that such onerous, broad-scale reporting requirements should be implemented as a part of this proceeding.

IV. CONCLUSION

For these reasons, the Commission should find that the opt-out method satisfies the customer consent requirement of Section 222(c)(1) of the Act.

Respectfully submitted,

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